

No. 92-1911

Supreme Court, U.S.

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In the

Supreme Court of the United States

October Term, 1993

PUD NO. 1 OF JEFFERSON COUNTY AND  
THE CITY OF TACOMA,

*Petitioners,*

v.

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY, DEPARTMENT OF FISHERIES AND  
DEPARTMENT OF WILDLIFE,

*Respondents.*

ON A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF WASHINGTON

BRIEF OF THE WESTERN URBAN WATER  
COALITION AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS

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In accordance with this Court's Rule 37, the Western Urban Water Coalition ("WUWC") has received written consents of counsel for both parties to file this brief as *amicus curiae*. Copies of the written consents have been filed with the clerk.

#### **INTEREST OF *AMICUS CURIAE***

The WUWC is a national association of municipal water utilities of the largest cities in the western United States. The goal of WUWC members is to provide a reliable, high quality urban water supply for present and future water users,

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and the WUWC is organized to help achieve that goal through ground water policies; programs and regulations. Urban water supplies must be adequate to accommodate rapid regional growth, sustain people, and maintain and build the economy while protecting and enhancing western environmental values. The WUWC members currently serve over 30 million urban water consumers in the states of Arizona, California, Colorado, Nevada, Oregon, Utah and Washington.<sup>1</sup>

Members of the WUWC own and operate water management, water supply and hydroelectric projects. These projects consist of dams, water conduits, reservoirs, power houses, transmission lines and other facilities involved in water supply, water transfer and power generation services. These facilities are essential to the ability of WUWC members to fulfill their mission of servicing the water resource-related needs of the majority of the populations of the western states.

In constructing, operating and maintaining these projects, members of the WUWC must obtain and comply with permits issued under § 402 (national pollutant discharge elimination system) and § 404 (discharges of dredged or fill material into wetlands) of the Clean Water Act ("CWA"), 33

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<sup>1</sup>The WUWC represents the following urban water utilities: Arizona - City of Phoenix; California - Central Basin Municipal Water District and West Basin Municipal Water District, Contra Costa Water District, East Bay Municipal Utility District, Los Angeles Department of Water & Power, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utility Commission, Santa Clara Valley Water District; Colorado - Denver Water Department; Nevada - Big Bend Water District, Las Vegas Valley Water District, Southern Nevada Water Authority, Westpac Utilities; Oregon - City of Portland, Bureau of Water Works; Utah - Central Utah Water Conservancy District, Metropolitan Water District of Salt Lake City; and Washington - City of Seattle.

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U.S.C. §§ 1342, 1344, and licenses issued under §§ 4 and 15 of the Federal Power Act ("FPA"). 16 U.S.C. §§ 797, 808. These federal permits and licenses require, as a prerequisite, that the state issue a water quality certification under § 401 of the CWA. By holding that a § 401 certification may specify conditions that do not relate to pollutant discharges, such as minimum stream flows for fisheries restoration and mitigation purposes, the Washington Supreme Court decision would impose significant new regulatory requirements on WUWC members. If not reversed, the decision will, in many instances, make it more difficult and costly for WUWC members to meet their obligations to provide water supply and hydropower to the residents of the major urban centers and make it less certain that they will be able to do so. In some cases, as in the hydroelectric project that Petitioners' propose to build, the opinion below will preclude the project altogether.

### STATEMENT

Petitioners, a city and a public utility district, planned to construct a hydroelectric project in Washington. They sought a license from the Federal Energy Regulatory Commission ("FERC") as required by § 4(e) of the FPA. 16 U.S.C. § 797(e). They also sought a water quality certification from the Washington Department of Ecology as required by § 401(a) of the CWA. 33 U.S.C. § 1341(a). Washington's § 401 certification imposed a condition that Petitioners maintain a minimum stream flow in the river that is the proposed hydroelectric power source. The stated purpose of the minimum stream flow was to prevent degradation of fish habitat and spawning. That condition automatically becomes a condition on the FERC license or other federal permit under § 401(d).

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#### A. PETITIONERS' HYDROELECTRIC PROJECT

Petitioners propose to construct a new electric power generating facility, the Elkhorn Hydroelectric Project, on the Dosewallips River in Washington. The Elkhorn Project would divert, but not store, waters of the Dosewallips in a run-of-river mode of operation. The diverted water will run turbines to generate electricity and be returned to the Dosewallips downstream. The distance between the initial intake and the return - the bypass reach - is 1.2 miles. Pet. App. 4(a), 31(a).

Petitioners proposed to maintain minimum stream flows in the bypass reach of 65 cubic feet per second (cfs) to 155 cfs, depending on the month. The Washington State Department of Ecology issued a § 401 water quality certificate conditioned upon Petitioners' maintaining stream flows between 100 cfs and 200 cfs. Pet. App. 5(a). Petitioners assert that meeting the stream flow conditions of the § 401 certification would render the hydroelectric project economically infeasible.

The Supreme Court of Washington held that the § 401 condition of maintaining the higher stream flow levels was necessary to prevent the degradation of fish habitat and spawning in the Dosewallips. The court stated that the Department of Ecology had determined that the stream flow conditions proposed by Petitioners risked such degradation. Pet. App. 7a-8a. Significantly, the Department of Ecology concluded that although the stream flow conditions of the § 401 certification "are in excess of those required to maintain water quality in the bypass region, they are flows recommended by the resource agencies and tribes for maintaining sufficient flows for the fishery resource." Pet. App. 83a-84a.

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#### B. FEDERAL POWER ACT

Pursuant to § 4(e) of the FPA, FERC has exclusive authority to issue licenses for hydroelectric projects. 16 U.S.C. § 797(e). The FPA regulatory scheme requires FERC to consider and to balance "the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat) . . . and the preservation of other aspects of environmental quality." 16 U.S.C. §§ 797(e), 803(a)(1).

Section 10(j) of the FPA requires FERC to include in each license conditions for the protection, mitigation and enhancement of fish and wildlife as enumerated in §§ 4(e) and 10(a). Specifically, the "conditions shall be based on recommendations received . . . from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and state fish and wildlife agencies." 16 U.S.C. § 803(j)(1). The FPA further provides in § 10(j)(2) that FERC must decide whether the recommendations are inconsistent with the purposes and requirements of the FPA. If FERC cannot resolve inconsistencies, it may refuse to adopt in whole or in part the recommendations of fish and wildlife agencies, but FERC must make specific findings supporting its decision. 16 U.S.C. § 803(j)(2).

#### C. CLEAN WATER ACT

The CWA sets forth a complex regulatory system administered primarily by the Environmental Protection Agency ("EPA"), but also administered by the States under EPA supervision. Section 401 requires a state certification as a prerequisite to the issuance of a federal permit or license (including a FERC hydroelectric project license) to construct or operate a facility "which may result in any discharge into

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the navigable waters.” 33 U.S.C. § 1341(a)(1). The state must certify that any discharge will comply with §§ 301, 302, 303, 306 and 307 of the CWA.

Section 401(d) requires that a water quality certification set forth “effluent limitations and other limitations, and monitoring requirements” to assure that the applicant for any federal license or permit will comply with limitations or standards under §§ 301, 302, 306 or 307, and with “any other appropriate requirement of State law” set forth in the certification. Any limitation or condition in the certification “shall become a condition on any Federal license or permit.” 33 U.S.C. § 1341(d)

FERC has concluded that it has no authority to reject or alter conditions in a § 401 certification, even if the conditions are outside the scope of § 401, and that only state courts may pass judgment on such certifications. *Town of Summersville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992), *reh'g denied*, 63 F.E.R.C. ¶ 61,037 (1993); *Dept. of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992). EPA has similarly concluded that state limitations and conditions in certifications are reviewable only in state courts, 40 C.F.R. § 124.55(e), and the courts have agreed. *Roosevelt Campobello Int'l Park Comm'n. v. EPA*, 684 F.2d 1041 (1st Cir. 1982); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977).

### SUMMARY OF ARGUMENT

This case presents a fundamental issue of statutory construction of § 401 of the CWA. The State of Washington exceeded its authority to issue a water quality certification under § 401(d) by imposing a condition that Petitioners maintain minimum stream flows. If § 401 is construed to authorize states to impose conditions not related to pollutant

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discharges, such as stream flow requirements, state certifications will directly conflict with the exclusive responsibilities of FERC under § 10 of the FPA, confuse the separate regulation of water quality and water quantity, and expand the CWA into areas of regulation not intended by Congress. Although the content of water quality standards may present a question of state law, questions regarding compliance with the CWA, including the scope of § 303 and the scope of authority of the States to issue § 401 certifications, are federal questions. Section 401 should be construed in connection with other provisions of the CWA and can and should be construed in a way that the apparently conflicting provisions of the FPA and CWA are harmonized.

Section 401(a), not § 401(d), as assumed by the Supreme Court of Washington, authorizes states to issue water quality certifications. Section 401(d) defines the conditions that may be placed on certifications by reference to the applicable CWA provisions with which compliance is required by § 401(a)(1). Each of the listed applicable provisions, like the core purpose of the CWA, is directed at limiting or controlling pollutant discharges into navigable waters. The authority of states to impose conditions in § 401 certifications is circumscribed: the condition must limit (a) pollutant discharges (b) to assure that the discharges comply with (c) listed applicable CWA provisions directed at discharges. If there is no pollutant discharge, the certification must be unconditional.

Washington's minimum stream flow requirement is not a condition authorized by § 401. It is not a condition on Petitioners' proposed discharge (the return of waters through a tailrace), but rather a requirement regarding the stream itself. It is also not a condition that relates to compliance with the applicable CWA provisions listed in § 401 because it is not a limitation on pollutant discharges.

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Section 401(d)'s use of the phrase "any other appropriate requirement of State law" also does not authorize the stream flow condition. That phrase, under principles of *ejusdem generis*, must be construed in connection with the listed CWA provisions that precede it, all of which serve to restrict pollutant discharges. The only appropriate state law requirements that may be the basis of a condition in a § 401 certification are those requirements establishing limitations on pollutant discharges to navigable waters. A minimum stream flow is not such a requirement. "[O]ther appropriate requirement of State law" has a purpose, however, for it allows a § 401 certification condition to impose state restrictions on pollutant discharges above and beyond the restrictions of the CWA. This reading of § 401 is consistent with the power of the States, preserved in § 510 of the CWA, to impose more stringent requirements.

## ARGUMENT

### I. PRINCIPLES OF STATUTORY CONSTRUCTION REQUIRE THAT § 401 BE CONSTRUED CONSISTENTLY WITH OTHER PROVISIONS OF THE CWA AND CONSTRUED TO BE IN HARMONY WITH APPARENTLY CONFLICTING PROVISIONS OF THE FPA

The Supreme Court of Washington held that the stream flow condition of the § 401 certificate was necessary for the State to certify compliance with state water quality standards and was authorized by the language of § 401(d) allowing states to condition certification on "any other appropriate requirement of State law." The Court erred in construing one provision of § 401 in isolation, without reference to the whole of the CWA or even all of § 401 as a context for discerning Congress' intended meaning.

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In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

*Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122, 49 U.S. 113 (1849)). Particularly in the context of a complex regulatory system such as the CWA, a given section should be construed in connection with other parts and sections to achieve uniformity of approach and consistency of meaning. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir. 1987).

Not only did the court below fail to follow the principle that statutes must be read as a whole, it never attempted to harmonize its CWA construction with the apparently conflicting provision of the FPA. Instead, the court reasoned that FERC might impose the same stream flow condition under § 10(j) of the FPA as Washington attempts to impose under § 401 of the CWA, and, therefore, there was no actual conflict between the State's certification under § 401 and FERC's obligations under § 10(j) of the FPA. Thus, it rejected Petitioner's argument that the FPA preempted a state's ability to impose stream flow conditions under § 401. This reasoning is erroneous because under § 401 of the CWA certification conditions become conditions on the FERC license by operation of § 401(d). Thus, FERC is foreclosed from imposing a conflicting condition because the state has usurped its responsibility.

Quite plainly, § 10 of the FPA vests FERC with authority—not yet exercised in this case—to determine under a balancing test whether stream flow requirements are a necessary condition of the license. In *California v. FERC*,

495 U.S. 490 (1990), this Court rejected a state's imposition of stream flows for fish protection under § 27 of the FPA. In that case, California's action under state law was found inconsistent with, and therefore preempted by, FERC's primary role to set stream flows in connection with licensing hydroelectric projects. Congress would not have granted this authority to FERC in enacting § 10(j) of the FPA in 1986 if it had already vested states with authority over stream flows as water quality conditions under § 401 of the CWA.<sup>2</sup>

Unless the conflict between them is irreconcilable, related statutes should be read *in pari materia* to give effect to each. "Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible." 2A C. Sands, *Sutherland Statutory Construction*, § 51.02 (4th ed. 1984); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). In this case § 401 can be construed consistently with § 10 of the FPA and consistently with other provisions of the CWA. As a matter of statutory construction, that course must be followed to avoid the conflicting mandates that might otherwise lead to an implied repeal or limitation of § 401 by the later and more specific § 10(j) of the FPA.

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<sup>2</sup>Congress has also recognized in the CWA that stream flow regulation is within FERC's authority. Section 102(b)(6) of the CWA expressly excepts from FERC license authority "storage for regulation of streamflow for the purpose of water quality control unless the Administrator [of EPA] shall recommend its inclusion . . . ." 33 U.S.C. § 1252(b)(6). Although storage for regulation of stream flow is not applicable in the instant case because Elkhorn is to be a run-of-river mode of operation, § 102 excepts storage regulation from FERC authority, not state authority under § 401.

## II. SECTION 401(a)(1), NOT § 401(d), ESTABLISHES THE BOUNDS OF STATE CERTIFICATION

Section 401(a)(1) requires that, in order to conduct a proposed activity that "may result in any discharge into the navigable waters," an applicant for a federal license or permit obtain a certificate from the state that "such discharge will comply with the applicable provisions" of §§ 301, 302, 303, 306 and 307. If there is no applicable effluent limitation under §§ 301(b) or 302 and no applicable standard under §§ 306 and 307, the state is to so certify. Under § 401(d), the state is to include in its certificate any condition necessary to "comply" with an effluent limitation under §§ 301 or 302, a standard of performance under § 306, a prohibition, effluent standard or pretreatment standard under § 307, or "any other appropriate requirement of State law."

Section 401 was adopted from § 21(b) of the pre-1972 Federal Water Pollution Control Act. See Water Quality Improvement Act of 1970, Pub. L. No. 91-224 § 103, 84 Stat. 91. The earlier version required state certification that a federally licensed activity with a discharge would "not violate applicable water quality standards," § 21(b)(1). The earlier version also lacked a counterpart to the present § 401(d). When Congress passed comprehensive amendments to the water pollution control statute in 1972 (Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1977)), it made significant changes to § 401. In § 401(a) it substituted compliance with the appropriate provisions of §§ 301, 302, 306 and 307 for compliance with water quality standards as the subject of certification. It also substituted certification of the discharge for certification of the discharging activity. Finally, it added § 401(d). Section 401 was subsequently amended in 1977 to add § 303 to the list of provisions appearing in § 401(a).

Clean Water Act of 1977, Pub. L. No. 95-139, 91 Stat. 1566. According to the Conference Report, this was not intended to change existing law but to clarify that water quality standards from § 303 were already incorporated by referring to § 301. Indeed, the Conference Report concluded, "section 303 is always included by reference where section 301 is listed."<sup>3</sup>

Section 401(a)(1) governs the scope of Washington's certification, not § 401(d), as the court below assumed. Section 21(b)(1) required certification using language virtually identical<sup>4</sup> to that used in § 401(a). Section 21(b)(1) had no counterpart to § 401(d). The pre-1972 equivalent of § 401(a)(1) served very well with no equivalent of § 401(d). Thus, § 401(d) was a relative afterthought and is not the driving force of the section. The wording of the two parts of the section makes this clear. Under § 401(a)(1) "any applicant for a federal license ... shall provide ... a certification from the State. ... No license ... shall be granted if certification has been denied ...." Moreover, § 401(a)(1) establishes precisely what the state must certify: that any discharge from the licensed activity "will comply with the applicable provisions" of §§ 301, 302, 303, 306 and 307. Subsection 401(d) is clearly subordinate, providing only

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<sup>3</sup>H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. at 96 (1977). Its conclusion is correct: § 301(b)(1)(c) does incorporate water quality standards into § 301, although it does not mention § 303. But as § 303 is the section establishing water quality standards, its incorporation is inherent when incorporating water quality standards. Indeed, because Congress in its 1972 amendments to the Act retained water quality standards as one means of deriving effluent limitations for pollutant discharges, it would be inconsistent with congressional intent in the 1972 amendments to ignore water quality standard-based effluent limitations in § 401 certifications.

<sup>4</sup>The exception, of course, was that the pre-1972 provision focused on compliance with water quality standards while the post-1972 provision focuses on compliance with the applicable requirements of the enumerated provisions.

more detailed instructions as to the content of the certification required "under this section," *i.e.*, under § 401(a)(1).

Section 401(d) adds nothing to this list of applicable provisions other than the terminal phrase "any other appropriate requirement of State law." As argued in greater detail in Part IV below, the general phrase cannot expand the class of specific limitations that precedes it. Thus, the phrase means state restrictions on pollutant discharges that are in addition to or more stringent than restrictions contained in provisions listed in § 401(a)(1).

### III. THE STREAM FLOW MAINTENANCE CONDITION IN WASHINGTON'S CERTIFICATION IS BEYOND THE AUTHORITY FOR STATE CERTIFICATION ESTABLISHED IN § 401(a)(1)

The certification requirement is found in § 401(a)(1), and that section, not § 401(d), is where the analysis of any claimed authority to impose stream flow maintenance conditions must begin. Certification is not required for every federally licensed activity, but only for those which may involve a "discharge" into navigable waters. The state is authorized to certify only that (a) the "discharge" will (b) "comply" with the (c) "applicable" provisions of the listed sections. Each of these concepts limits the scope of certification and hence the conditions that can be imposed in certification.

**A. Stream Flow Maintenance Is Not A Condition Authorized By § 401 Because It Does Not Involve A "Discharge"**

"Discharge" is defined in § 502(16): "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." Those terms, in turn, are defined in § 502(12), and together they evoke the basic prohibition of § 301(a) against the discharge of a pollutant without or in violation of a § 402 permit. When parsed in conjunction with the definitions in § 502, § 301(a) makes unlawful the addition of a pollutant to navigable waters from a point source without a permit or in violation of permit conditions.<sup>5</sup>

Because the definition of "discharge" "includes" the term of art, "discharge of pollutants," the definition of the general term "discharge" suggests a broader connotation than only the "discharge of pollutants." The import of § 502(16) then, is that federal licenses or permits for activities that result in discharges of pollutants require § 402 permits and § 401 certifications; while federal licenses or permits for activities that result in other types of discharges to navigable waters that do not require § 402 permits still require § 401 certifications. The broader reading of "discharge" is further supported by the fact that "discharge" was used in the original § 21(b), before "discharge" was defined, before

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<sup>5</sup>Section 401 could be read as applying only to the discharge of pollutants which requires a § 402 permit. EPA takes the position that the type of discharge at issue here does not require a § 402 permit, and the courts have concurred in that position. *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Reading § 401 to apply only to § 402 "discharges of pollutants" would make the provisions redundant.

"discharge of a pollutant" was used or defined, and before there was a § 402 permit requirement for the "discharge of a pollutant." Finally, the certification requirement is most useful for discharges which do not require a § 402 permit. When a § 402 permit is required, EPA or the state will apply the requirements of §§ 301, 302, 303, 306 and 307 to derive effluent limitations on pollutants in the discharge. If a discharge requires no § 402 permit, however, the state under the § 401 certification process, nonetheless, makes that determination thereby assuring protection of the receiving waters.

Section 401 itself does not indicate any particular meaning for "discharge" beyond common parlance. *Webster's Third New International Dictionary* 644 (1986) defines discharge as "a flowing or issuing out . . . a rate of flow" and gives as an example of usage "a rapid [discharge] of water from a pipe." Under this definition the term "discharge" is independent of whether it adds a pollutant to a navigable water from a point source.

The condition in Washington's certification requiring maintenance of minimum stream flows in the Dosewallips River is not a condition on the discharge from the proposed activity into navigable water. It is therefore not within the authorization of § 401. Section 401(a)(1) is very specific in this regard. It does not require certification of all federally licensed activities or even those occurring in or affecting navigable water; it requires certification only for federally licensed activities that have a discharge into navigable waters. Moreover, even for federally licensed activities requiring a § 401 certification, § 401(a)(1) does not require certification regarding all aspects of the activity; it requires certification only regarding the discharge from the activity into navigable waters. In fact, Congress amended § 401(a)(1) in 1972 to make this clear. The only authorized flow rate

condition under § 401(a)(1) is for the flow rate of the discharge by the federally licensed activity through the tailrace into the river and not a condition on the flow rate of the river itself. The flow of the river simply is not "a discharge into navigable water" from a federally licensed activity.

**B. Stream Flow Maintenance Is Not A Condition Authorized By § 401 Because It Does Not Require "Compliance" With "Applicable" Provisions Listed In § 401(a)**

Section 401(a)(1) requires certification that the discharge into navigable waters from a federally licensed activity will "comply" with "applicable" provisions of the listed sections. Both terms must be read in connection with the word "discharge." It is the discharge that must comply with applicable provisions, and in order to be "applicable," the provision must be one that establishes a requirement directed at the discharge. Section 401(a)(1) requires certification that the discharge into navigable waters from a federally licensed activity will comply with applicable provisions of §§ 301, 302, 303, 306 and 307. Those sections establish requirements for both the regulatory agencies and for the regulated public. To qualify as an applicable provision of §§ 301, 302, 303, 306 or 307 for the purpose of § 401(a)(1) certification, the provision must apply some requirement with which the federal licensee, as a member of the regulated public, can comply. Obviously, if a listed provision states a requirement for regulatory agencies to meet (*e.g.*, establishing water quality standards), the regulated public cannot comply with the requirement and it cannot be a condition in a § 401 certification. Each of the listed sections provides requirements to be met by the regulated public: effluent limitations or standards for pollutant discharges.

Section 401(d) contemplates certification conditions that are "applicable" "effluent limitations" or "other limitations" under § 301 and § 302, "standard of performance" under § 306, or "prohibition, effluent standard, or pretreatment standard" under § 307. Although differently styled, each listed section serves to establish a variant of a single concept: restrictions on the amounts or concentrations of pollutants in a discharge. Review of these listed CWA provisions reveals that each is concerned with restrictions of pollutant discharges. Regulation of stream flow is not restricting a pollutant discharge and is therefore beyond the authority of § 401.

**1. § 301**

The basic regulatory prohibition of the Act is established in § 301(a). It makes unlawful the discharge of a pollutant except in compliance with § 301 and other enumerated sections, §§ 302, 306, 307, 318, 402 and 404. Apart from establishing the basic prohibition against the discharge of pollutants, § 301 does nothing more than establish effluent limitations that must be achieved by point sources as conditions of § 402 permits. Effluent limitations are of two types, and the point source must meet the more stringent of the two. The first is derived from various levels of treatment technology, § 301(b)(1)(A) and (B) and (b)(2). The second is calculated to achieve water quality standards, § 301(b)(1)(C). See also 33 U.S.C. §§ 1312 and 1313. Both are restrictions on the amounts or concentrations of pollutants in a discharge. Prior to 1972, federal water pollution control legislation focused entirely on requiring that discharges meet water quality-derived limitations. Comprehensive amendments of the statute in 1972 for the first time focused on requiring that discharges meet technology-based limitations that were made the primary focus of the CWA. *See EPA v. California*, 426 U.S. 200 (1976). Section 301(b)

also establishes deadlines for achieving its various effluent limitations. The remainder of § 301 consists of provisions for modifications of and variances to the technology-based effluent limitations and the deadlines for achieving them.

## 2. § 302

Section 301(b) establishes two successive sets of technology-based effluent limitations for pollutant discharges in (b)(1) and (b)(2). It requires more stringent limitations on pollutant discharges to a particular receiving water if the first level of technology-based standards does not achieve water quality standards for the receiving water, 33 U.S.C. § 1311(b)(1)(C). Section 302(a) accomplishes the same purpose if the second level of technology-based standards does not achieve water quality standards.

## 3. § 303

The primary approach to developing effluent limitations on pollutants discharged from point sources under all of these sections is to base them on the pollutant removal that various levels of technology can achieve. If technology-based effluent limitations do not remove enough pollutants to meet the desired quality of the receiving water, however, more stringent effluent limitations on pollutants are developed to meet water quality standards established for the receiving water. This second approach is required in §§ 301(b)(1)(C) and 302 and is based on § 303.

Section 303 requires states and EPA to establish water quality standards. Water quality standards consist of only two elements: 1) designated uses for receiving waters and 2) criteria necessary to support the designated uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 130.2(d), 130.3, 131.2(i) and 131.3. The designated use for a particular waterway may be the propagation of native fish. The criteria

supporting that use include limitations on the concentrations of pollutants in the waterway necessary to assure fish survival and propagation. Once the state develops these standards and EPA approves them, they become a part of federal law. *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992). Water quality standards "serve the dual purposes of establishing water quality goals . . . and serving as the regulatory basis for establishment of water quality-based treatment controls . . . beyond the levels of treatment required by sections 301(b) and 306 of the Act." 40 C.F.R. § 130.3. After establishing water quality standards, the states and EPA are required by § 303 to determine water bodies where such standards are not being met. 33 U.S.C. §§ 1313(d)(1)(A) and 1314(c)(1)(A)(B). They are then required to determine the total amount of pollutants that can be present in those water bodies without violating the standards (the load or total maximum daily load). 33 U.S.C. §§ 1313(d)(1)(C), (2), (3). Finally, they are required to develop effluent limitations for point sources by allocating the permissible pollutant load between point sources and non-point sources that contribute the pollutant to the water body. 33 U.S.C. §§ 1313(d)(4), 1314(c)(1)(D). The preponderance of requirements in § 303 are for states and EPA to develop water quality standards and then to develop effluent limitations for point source discharges of pollutants in order to meet the standards. Significantly, the only aspect of § 303 with which a member of the regulated public can comply is an effluent limitation on a pollutant discharge. While such an effluent limitation is developed to achieve a water quality standard, the effluent limitation is not itself a water quality standard.

## 4. § 306

Section 306 requires EPA to develop a "standard of performance" for the control of the discharge of pollutants

from new sources. These standards are based on technologically achievable treatment, § 306(b)(1)(B), and are much the same as the technology-based effluent limitations required in § 301(b). Indeed, EPA promulgates them together with the § 301(b) technology-based effluent limitations. *See, e.g.,* 40 C.F.R. Pt. 415. *See also E.I. du Pont de Nemours & Co., supra*, 430 U.S. 112. Section 306 technology-based standards of performance do not differ materially from § 301(b) technology-based effluent limitations, except that they apply to new sources. They are restrictions on the amounts or concentrations of pollutants in a discharge.

### 5. § 307

Section 307 requires EPA to promulgate § 301(b) technology-based effluent limitations for various toxic pollutants and authorizes it to promulgate more stringent effluent standards for them under § 307(a). The effluent standards are to be based on the toxic effect of the pollutants, but still take the form of restrictions on the amounts or concentrations of the pollutants in a discharge. In addition, § 307(b) requires EPA to promulgate effluent standards to be met by industries discharging pollutants into municipal sewage treatment plants (so-called "indirect sources"). For the most part these standards are technology-based standards, analogous to the most stringent technology-based standards for toxics under § 307(b)(2). *Chemical Mfrs. Assn. v. NRDC*, 470 U.S. 116 (1985). Indeed, EPA routinely promulgates these so-called pretreatment standards together with its § 301(b) technology-based effluent limitations under 40 C.F.R. Pt. 415. There are, however, other types of pretreatment standards for indirect discharges that are not technology-based, 40 C.F.R. § 403.5, but they too are restrictions on the amounts or concentrations of pollutants in the indirect source's discharge.

All of these various requirements come together in § 402 permits for individual point sources. Section 402 permits incorporate effluent limitations on pollutants for individual discharges based on technology-based standards from §§ 301(b) and 306, on treatment necessary to achieve water quality standards from §§ 302 and 303 and on toxic effluent standards from § 307.

Thus, all of the listed sections in § 401(a)(1) are means of developing effluent limitations on pollutant discharges. They do so by different means, but the only requirements they establish for members of the regulated public are restrictions on the amounts or concentrations of pollutants in discharges. The certification condition on the flow rate of the Dosewallips River is not a restriction on a pollutant discharge, is therefore not an applicable provision of one of the listed sections, and is therefore not authorized by § 401.

### **C. The Supreme Court Of Washington Erred In Concluding That The Use Designation Of The Dosewallips River And The State Antidegradation Policy Were Water Quality Standards Applicable To The Discharge.**

The Washington Supreme Court held that § 401 "requires states to certify compliance with water quality standards." Pet. App. 7a. There are two flaws in this conclusion. First, § 401 does not require states to certify compliance with state water quality standards; instead it requires certification that the discharge from a federally licensed activity "comply with the applicable provisions" of the listed sections of the CWA.

Second, water quality standards (water body use designations and supporting criteria) in themselves simply do not establish applicable requirements with which discharges

must comply or even can comply. Standing alone they provide only goals. 40 C.F.R. § 130.3. Goals are not requirements.<sup>6</sup> Aside from establishing goals, water quality standards only provide the basis for establishing requirements with which discharges must comply. 40 C.F.R. § 130.3. But to establish such requirements, a total maximum daily loading ("TMDL") must be developed for a criterion in a water body and the loading must be allocated among contributing discharges. 40 C.F.R. § 130.7. This process could not lead to the type of requirement imposed in the Washington certification condition. That is because stream flow simply is not the sort of criterion contemplated by the CWA. Indeed, flow is not even a criterion of the Washington water quality standards. WAC 173-201-035, 047. Water quality criteria represent "a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). Stream flow represents water quantity, not water quality. TMDLs and effluent limitations derived from TMDLs are established for "pollutants." 40 C.F.R. § 130.7(c). Stream flow is not a "pollutant" as defined in § 502(6).<sup>7</sup>

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<sup>6</sup>Nor are policies requirements. One of the two purported water quality standards on which the court below relied was the State's antidegradation provision, which describes itself as only a policy.

<sup>7</sup>The court below seeks to broaden water quality standards by focusing them on "pollution" rather than on "pollutants." Indeed, the two terms are different. "Pollutant" focuses on a cause of pollution: the constituents in a discharge to the receiving water, § 402(c). While the ultimate concern of water quality standards is the abatement of "pollution," the means used to abate it is to restrict "pollutant" discharges. Section 303 does not use the term "pollution," but directs EPA and the states to develop effluent limitations based on waste load allocation of "pollutants" under § 303(d). "Pollutant" does not subsume "pollution" in this regard. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). In any event, the flow rate of a river or of a discharge is neither a "pollutant" nor "pollution."

This analysis might suggest that the state could at least impose a certification condition on the flow of the discharge from the proposed activity, if it had promulgated a flow criterion to support its Class AA use designation for the Dosewallips River. Such a suggestion would fail, however, since flow is not a criterion of water quality. It denotes quantity, not quality. If stream flow were considered a criterion of water quality standards, then stream flow would be allocated by state and federal water pollution control officials in the establishment of water quality management programs under § 303. This practice would be inconsistent with the century-long development of the law governing western water rights. If flow maintenance were considered part of water quality standards, state and federal water pollution control officials could then dictate how much stream flow could be allocated for irrigation and other off-stream purposes. This also would wreak havoc on the century-long development of western water rights.

If stream flow were considered part of water quality standards, every downstream state could control the allocation of water for off-stream use in upstream states. Section 401(a)(2) requires the federal licensing or permitting authority to condition its license to assure compliance with the water quality standards of downstream states and to deny a license or permit if they cannot be met. This would give downstream states a stranglehold on water use and allocation in upstream states that would make the parade of horrors foreseen in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) pale by comparison. It could also disturb allocations in interstate compacts and in cases of this Court.

The CWA deals with water quality, not water quantity. Water quantity involves a wholly different body of laws and regulations as is made clear in the specific policy statement of § 101(g) of the CWA that water quantity allocation is the

exclusive domain of the States. The author of § 101(g), Senator Wallop of Wyoming, explained:

It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other purposes. It does not interfere with the legitimate purposes for which the act was designed. . . .

Water quality and interstate movement is an acceptable Federal role and influence. But the States historic rights to allocate quantity, and establish priority of usage remains inviolate because of this amendment. This act remains an act to protect the quality of water and to protect critical wetlands in concert with the various States. In short a responsible Federal role.

123 Cong. Rec. S26762 (daily ed., Aug. 4, 1977) (Statement of Sen. Wallop).

#### **IV. STREAM FLOW MAINTENANCE IS NOT A CONDITION AUTHORIZED BY § 401(d)**

The Supreme Court of Washington seeks to avoid the lack of support in § 401(a)(1) for Washington's flow maintenance certification condition by relying on § 401(d). This reliance is unfounded for several reasons. First, the certification is required by § 401(a)(1), not by § 401(d). Subsection (d) merely establishes the content of the certification required by § 401(a)(1). Because § 401(a)(1)

establishes the bounds of the certification, *i.e.*, compliance with §§ 301, 302, 303, 306 and 307, the contents of the certification established by § 401(d) can go no further than the bounds established in § 401(a)(1). As demonstrated above, § 401(a)(1) does not authorize the State to set conditions on the stream flow of the Dosewallips River.

Neither § 401(a)(1) nor § 401(d) authorizes a minimum stream flow condition. Section 401(d) authorizes only "effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with [the listed CWA provisions and] any other appropriate requirement of State law . . . ." Thus, the only conditions that can be imposed are federal and state requirements to comply with "effluent limitations, other limitations or monitoring requirements." The latter is irrelevant to this case. "Effluent limitations and other limitations" are not used randomly here. They are words charged with meaning in the CWA, particularly in §§ 301, 302, 303, 306 and 307. They refer to variously derived restrictions on pollutant discharges to navigable waters, whose meaning becomes clear upon reviewing the specific list of CWA provisions for which conditions are authorized. "[A]pplicable effluent limitations and other limitations" under §§ 301 and 302 are restrictions on pollutants in discharges derived either to meet technology-based standards or to achieve water quality standards. 33 U.S.C. § 1311(b) and § 1312(a). "[S]tandard of performance" under § 306 is a technology-based standard restricting pollutants in discharges from new sources. 33 U.S.C. § 1316(a)(1). "[P]rohibition, effluent standard, or pretreatment standard" under § 307 means restrictions on or prohibitions against toxic pollutants in discharges, § 307(a), or in indirect discharges (discharges to municipal sewage treatment plants), § 307(b).

The phrase "other appropriate requirement of State law" is limited to "effluent limitations and other limitations." As used in the CWA, these terms refer to restrictions on pollutant discharges. The list of specific requirements preceding the general phrase enumerates the various types of restrictions established in the CWA for limiting pollutant discharges. Under the *ejusdem generis* principle of statutory construction, where general words follow specific words in a statutory listing, the general words must be confined to the class or subject of the preceding specific listing. 2A C. Sands, *Sutherland Statutory Construction*, § 47.17 (4th ed. 1984); *Cleveland v. United States*, 329 U.S. 14, 18 (1946). The application of this principle is particularly appropriate where, as here, the general phrase and the preceding listing of specific requirements are in a subordinate section, but the listing of specific requirements, without the general phrase, appears in and defines the governing section.

For all of the above reasons, the "other appropriate requirement of State law" on which § 401(d) certification conditions may be based, is a requirement establishing limitations on pollutant discharges to navigable waters. The stream flow maintenance condition, of course, is not such a requirement. This limitation on the types of "appropriate requirement[s] of State law" that may be the basis of certification conditions does not deprive that phrase of meaning. For instance, states may have effluent limitations and other limitations on a "discharge of pollutants" to navigable waters requiring § 402 permits in addition to and more stringent than those established in the CWA; and they may have limitations on a "discharge" to navigable waters not requiring § 402 permits for which there are no federal effluent limitations or other limitations. Such state laws are specifically preserved in § 510.

A broader reading of "other appropriate requirement of State law" is not necessary to give it meaning, is not consistent with the remainder of the CWA, leads to disharmony between the CWA and the FPA and invites intrusion of water quality regulation into water quantity allocation, a result specifically prohibited by § 101(g).

For all the above reasons, the WUWC respectfully urges the Court to reverse the judgment of the Supreme Court of Washington.

RESPECTFULLY SUBMITTED, this 16th day of November, 1993.

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